

Rodriguez v. Maricopa Co. Comm. College, __ F3d __ (9th Cir. 2010).

This case concerns the tension between a public employee's First Amendment rights and the right of fellow employees to be free of workplace harassment.

Hispanic faculty and staff at Maricopa County Community College District filed suit against the District, arguing that it illegally refused to discipline a professor who sent offensive, racially charged emails to District employees over a District managed listserv. One of the emails stated that "America did not become the mightiest nation on earth without distinct values and discrimination" and that the America's "survival depends on discrimination." Another stated that "[m]ost thinking people believe that the European, Christian victory over the Moorish, Islamic (and African) culture in Spain is an example of a victory of a 'backward' culture over one that was more civilized, [however] history has answered quite convincingly which cultures were backward."

Although the District issued statements condemning the professor's emails and stating they did not reflect the District's values and viewpoints, no disciplinary action was taken against the professor under the district's anti-harassment policy.

The Fourteenth Amendment's Equal Protection Clause requires public employers who become aware of workplace harassment to stop it. The issue in this case turned on whether or not the professor's e-mails constituted workplace harassment.

In its decision, the Ninth Circuit noted that harassment law mainly addresses conduct, whereas the professor's emails were pure speech that did not contain any real or implied threat of conduct. This was particularly true given that the plaintiffs did not allege that the professor's speech was made in the context of a supervisory relationship or that the District endorsed or adopted the professor's opinions. The court reasoned that the First Amendment permits employees in an academic community to freely debate controversial issues and administrators would potentially violate a public employee's right to engage in such debates if they disciplined those who expressed unpopular views. In the absence of speech that threatens conduct or consequences against particular individuals, the court noted that the "right to provoke, offend and shock lies at the core of the First Amendment." The Ninth Circuit therefore held that the Constitution did not require the District to discipline an employee for expressing controversial ideas.

This case serves as a reminder to public employers to tread carefully in the presence of offensive workplace speech. While it is no doubt important to promote and maintain a workplace culture of mutual respect and compassion, public employers are charged with the additional duty to ensure that their employees are afforded a right to speak freely, even if that speech concerns topics or issues that the vast majority of their colleagues would find repugnant. If specific conduct or threats do not accompany such speech, public employers run the risk of violating the speaker's First Amendment rights if they discipline the speaker.